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In The

Supreme Court of the United States

October Term, 1996

ROBERT J. TOLCHIN, individually and on behalf of all others similarly situated,

Petitioner,

v.

THE SUPREME COURT OF THE STATE OF NEW JERSEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF AMICUS CURIAE OF THE NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF RESPONDENTS

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QUESTIONS PRESENTED

Amicus Curiae, the New Jersey State Bar Association, adopts and incorporates the Questions Presented as set forth by Respondents, the Supreme Court of the State of New Jersey and the Institute for Continuing Legal Education.

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BRIEF *AMICUS CURIAE* OF THE NEW JERSEY STATE BAR ASSOCIATION IN SUPPORT OF RESPONDENTS[1]

Amicus Curiae, the New Jersey State Bar Association ("NJSBA"), as the primary voice of the members of the New Jersey bar, hereby requests that the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit sought by Petitioner, Robert J. Tolchin ("Petitioner" or "Tolchin"), be denied.

STATEMENT AND INTEREST OF *AMICUS CURIAE*

Petitioner challenges the authority of the New Jersey Supreme Court to determine the requirements it will impose on those seeking to practice law within its jurisdiction. This Court has traditionally recognized the autonomy of the states to set the qualifications for persons who wish to practice law in that state. *See, e.g., Leis v. Flynt,* 439 U.S. 438, 442, 444 n.5 (1978) (recognizing "the traditional authority of state courts to control who may be admitted to practice" and noting that "[s]ince the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States"); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975) (recognizing that states have "broad power to establish standards for

[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae,* its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

licensing practitioners and regulating the practice of professionals").

Over the past two decades, many lawyers have petitioned this Court for writs of certiorari charging that various state laws, rules and regulations governing the practice of law are unconstitutional. Only twice during that time has this Court granted writs to review such challenges. *See Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985). On two other occasions, this Court has granted writs of certiorari to review the local rules of two United States District Courts that placed certain requirements on those that sought to practice law within their respective jurisdictions. *See Barnard v. Thorstenn*, 489 U.S. 546 (1989); *Frazier v. Heebe*, 482 U.S. 641 (1987).

In each of these rare cases, the rule or regulation at issue facially discriminated against out-of-state residents in favor of in-state residents. *See Barnard*, 489 U.S. at 549 (local rule of the United States District Court for the District of the Virgin Islands required all attorneys otherwise qualified to demonstrate that he or she had "resided in the Virgin Islands for at least one year preceding his or her proposed bar admission" and had an intention to continue residing in the Virgin Islands and to practice law there); *Friedman*, 487 U.S. at 61 (Virginia rule allowed "qualified lawyers admitted to practice in other States" to be admitted to the Virginia Bar on motion upon a showing that the applicant was "a permanent resident of Virginia"); *Frazier*, 482 U.S. at 642 (local rule of the United States District Court for the Eastern District of Louisiana

required bar applicants to either live in Louisiana or maintain an office in Louisiana); *Piper*, 470 U.S. at 277 n.1 (New Hampshire rule required all bar applicants to "either be a resident of New Hampshire or file a statement of intent to reside there" and to be a "bona fide resident of the State . . . at the time the oath of office . . . is administered"). Accordingly, this Court reviewed the challenged rules under either the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution, or under its own "inherent supervisory power" over the United States District Courts.

Unlike the rules reviewed by the Court in each of these previous cases, the rule challenged here, N.J. Ct. R. 1:21-1(a) (the "Rule"), applies equally to all New Jersey lawyers regardless of domicile and it does not facially discriminate against non-residents. *Tolchin v. Supreme Court of the State of New Jersey*, 111 F.3d 1099, 1107 (3d Cir. 1997). Presumably realizing that a Privileges and Immunities Clause challenge would necessarily fail, Tolchin petitions this Court to review the constitutionality of the Rule solely under the Dormant Commerce Clause of Article I, § 8, clause 3.

In an opinion written by Judge Lewis, joined in full by Judge Cowen, and joined in part by Chief Judge Sloviter, the Third Circuit Court of Appeals properly rejected Petitioner's Dormant Commerce Clause challenge and upheld the constitutionality of the Rule. *Tolchin*, 111 F.3d at 1107. The Third Circuit did so by applying the balancing test announced by this Court in *Pike v. Church*, 397 U.S. 137 (1970), and refined in *Brown-Forman Distillers Corp. v. New York Liquor Authority*, 476

U.S. 573 (1986) (hereinafter the "*Pike/Brown* balancing test"). *Tolchin*, 111 F.3d at 1107.

Notably, Petitioner does not seriously contend that the Third Circuit should have applied a level of scrutiny other than the *Pike/Brown* balancing test. Instead, Tolchin's primary argument is that the Third Circuit reached the wrong result under the test. This Court typically declines to grant writs of certiorari when the petitioner is simply unhappy with the result reached below. *See Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974) (certiorari is not appropriate when the petitioner seeks to challenge only the correctness of the lower court's decision); *see also* ROBERT L. STERN, ET. AL., SUPREME COURT PRACTICE § 4.17 (7th ed. 1993) ("It has been reiterated many times that the Supreme Court is not primarily concerned with the correction of errors in lower court decisions.").

Even if this were one of the rare cases in which the Court would consider examining the correctness of the result reached by the Third Circuit, Judge Lewis's analysis rests on solid grounds that would not justify further review by this Court. As the Third Circuit concluded, the Rule is rationally related to the legitimate state interests advanced below by the New Jersey Supreme Court and the Institute for Continuing Legal Education. In addition, the Rule is also rationally related to the additional legitimate state interests advanced herein by the NJSBA as *amicus curiae*. Accordingly, this Court should not grant Tolchin's petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

The Rule establishes four requirements that all attorneys wishing to practice law in New Jersey must meet. Specifically, all New Jersey attorneys must (1) hold a plenary license, (2) comply with the skills and methods course requirements in effect on the date of the attorney's admission to the bar, (3) be in good standing, and (4) maintain a bona fide office for the practice of law in New Jersey. N.J. Ct. R. 1:21-1(a). The four requirements apply to all lawyers, regardless of where they are domiciled.[2]

Tolchin contends here, as he did below, that the bona fide office requirement and the skills and methods course requirement are unconstitutional under the Dormant Commerce Clause.

1. Tolchin Tacitly Concedes that the Third Circuit Properly Applied the *Pike/Brown* Balancing Test

The Third Circuit rejected Tolchin's Dormant Commerce Clause challenge by applying the *Pike/Brown* balancing test. *Tolchin*, 111 F.3d at 1108-11. Under the *Pike/Brown* balancing test, a court "must compare the local benefits of a regulation with the incidental burdens that it imposes on interstate commerce in order to determine whether the burdens are clearly excessive." *Id.* at 1108 (citing *Instructional Sys., Inc. v. Computer Curriculum Corp.*, 35 F.3d 813, 824 (3d Cir. 1994)). If the Court concludes, as the Third Circuit did below, that the challenged rule

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[2] The history of N.J. Ct. R. 1:21-1(a) is set out in detail in the Third Circuit's opinion and need not be repeated here. *See Tolchin*, 111 F.3d at 1103-05.

"only indirectly affects interstate commerce and regulates evenhandedly, a determination must be made as to whether the State's interest is 'legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.' " *Id.* at 1107 (quoting *Brown-Forman*, 476 U.S. at 579).

Tolchin does not seriously contend that the Third Circuit should have reviewed the Rule under any standard other than the *Pike/Brown* balancing test, such as the heightened scrutiny applicable when a state law facially or effectively discriminates against out-of-state interests. *See Brown-Forman*, 476 U.S. at 579.[3] Likewise, while Tolchin contends that "thousands" of lawyers and law firms are impacted by the Rule, *Petition* at 24, he does not contend that the Third Circuit wrongly concluded that the Rule only has an indirect effect upon interstate commerce.

Therefore, Tolchin tacitly concedes, as he must, that the Third Circuit properly invoked the *Pike/Brown* balancing test and that, because the Rule's impact on interstate commerce is only indirect, the Rule will withstand a Dormant Commerce Clause challenge so long as it is rationally related to a legitimate state interest. As demonstrated below, the Third Circuit's conclusion that the bona fide office requirement and the skills and methods course requirement are rationally related to legitimate state interests was wholly proper.

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[3] Tolchin renders lip service to the heightened scrutiny standard in only a single sentence. *Petition* at 20.

2. The Bona Fide Office Requirement is Rationally Related to Legitimate State Interests

Before both the district court and the Third Circuit, Respondent, the Supreme Court of the State of New Jersey, explained that the bona fide office requirement "has the benefits of assuring the competence, accountability and accessibility of attorneys for the benefit of clients, courts, counsel and parties." *Tolchin*, 111 F.3d at 1108. After analyzing this aspect of the Rule, the Third Circuit concluded that "a rational relationship exists between the benefit of attorney accessibility and the bona fide office requirement." *Id.* at 1109.

In his petition, Tolchin does not argue that the Third Circuit wrongly concluded that New Jersey has a legitimate interest in ensuring the accessibility of New Jersey attorneys to courts, clients, counsel, and parties. Instead, he contends that the bona fide office requirement is not rationally related to this legitimate state interest. The principal argument he advances in support of this contention is that this Court allegedly dismissed a similar argument in *Frazier v. Heebe*, 482 U.S. 641 (1987), and, therefore, the Third Circuit's decision "directly contradicts" the holding in *Frazier*. *Petition* at 20-22. Tolchin is mistaken.

First, the facts in *Frazier* are quite different from those presented here. In *Frazier*, the Court reviewed a local rule of the United States District Court for the Eastern District of Louisiana that required lawyers seeking to be admitted to the district court bar to either be a resident of Louisiana or to maintain a law office in Louisiana. The local rule did not require Louisiana residents to maintain a

Louisiana office. *Frazier*, 482 U.S. at 642. Therefore, the local rule facially discriminated against non-residents. Here, the Rule neither contains a residency requirement nor facially discriminates against non-residents.

Second, the *Frazier* majority did not review the constitutionality of the challenged local rule. Instead, the majority reviewed the local rule solely under the Court's "inherent supervisory power" to ensure the fairness of the local rules of the various United States District Courts. *Id.* at 645 (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968) (White, J., concurring)). The distinction was particularly important to the *Frazier* majority, which explained that the Court's authority over the federal courts was broader than its power over the individual state courts. Specifically, the *Frazier* majority noted that the Court's "authority over state court bars is limited to enforcing federal constitutional requirements." *Id.* at 647-48 n.7. The *Frazier* majority also observed that a more lenient standard was appropriate when reviewing state rules seeking to regulate the practice of law because "laws and procedures may differ substantially from state to state." *Id.* (citations omitted).

The three dissenting Justices in *Frazier*, Chief Justice Rehnquist, joined by Justices O'Connor and Scalia, did not agree with the majority's view that the Court possessed the "inherent supervisory power" to set aside local district court rules regulating admission to their respective bars. *Id.* at 651-52 (Rehnquist, C.J., dissenting). Therefore, the dissenting Justices reviewed the constitutionality of the mandatory office requirement and concluded that the rule passed constitutional muster. *Id.* at 655 (Rehnquist, C.J., dissenting).

Thus, the only three members of the Court to review the constitutionality of the mandatory office requirement in *Frazier* found that the requirement was constitutionally acceptable even though it facially discriminated against non-residents. Accordingly, Tolchin's contention that the Third Circuit's decision below "directly contradicts" this Court's ruling in *Frazier* is mistaken.

A subsequent decision of this Court further demonstrates that Tolchin has misread *Frazier*. Just one year after the *Frazier* decision was announced, this Court decided *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988). In *Friedman*, a Virginia state court rule allowed "qualified lawyers admitted to practice in other States" to be admitted to the Virginia Bar on motion upon a showing that the applicant was "a permanent resident of Virginia." *Friedman*, 487 U.S. at 61. Virginia contended, among other things, that the residency requirement advanced the state's interest in ensuring compliance with a separate requirement that members of the bar practice law "full-time" in Virginia. *Id.* at 63.

The majority of the *Friedman* Court, in an opinion authored by Justice Kennedy and joined by Justices Brennan, White, Marshall, Blackmun, Stevens, and O'Connor, held that the residency requirement was unconstitutional under the Privileges and Immunities Clause. *Id.* at 64-65. The majority dismissed Virginia's argument that the residency requirement ensured that attorneys complied with the full-time practice requirement by explaining in *dicta* that Virginia's mandatory office requirement was a "less-

restrictive" alternate means of advancing Virginia's interest in requiring lawyers to practice law full-time in Virginia. *Id.* at 69-70.[4]

Thus, between the dissenting opinion in *Frazier* and the majority opinion in *Friedman*, all of the Justices sitting on this Court during the 1987 and 1988 terms either wrote or joined in opinions supporting mandatory office requirements. Accordingly, Tolchin's contention that this Court has condemned such provisions is wholly mistaken.

If the Third Circuit's opinion in the present case is flawed in any respect, it is in the conclusion of two of the panel's three judges that the bona fide office requirement is not also rationally related to New Jersey's legitimate interest in securing the competency and accountability of those lawyers who practice law in New Jersey.[5]

The Third Circuit rejected the competency argument by relying solely on this Court's opinions in *Frazier*, *Piper* and *Barnard*. *Tolchin*, 111 F.3d at 1108-09 (citations omitted). Each of those cases, however, was decided under either the Privileges and Immunities Clause or this Court's inherent supervisory power over the district courts, and in each of those cases the Court reviewed the challenged rules under heightened scrutiny because the

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[4] In dissent, Chief Justice Rehnquist and Justice Scalia determined that the facially-discriminatory residency requirement – a much more egregious imposition on interstate commerce than that alleged here – passed constitutional muster. *Friedman*, 487 U.S. at 70-71.

[5] Chief Judge Sloviter did not join in this aspect of the opinion. *Tolchin*, 111 F.3d at 1109 n.3.

rules facially discriminated against non-residents. Under the heightened scrutiny analysis applicable in those cases, the Court had to determine if there were less-restrictive means of meeting the proposed state interests.

The same standard does not apply here. Under the *Pike/Brown* test, the state interest need only be rationally related to the challenged rule.[6] Moreover, the challenged rule does not have to be the least-restrictive means of achieving the legitimate state interest.

The bona fide office rule is rationally related to New Jersey's legitimate interest in ensuring the competency of lawyers who practice in New Jersey. The Third Circuit noted that the group of persons affected by the bona fide office requirement was not "a very large class" and included "those who practice solely, but sporadically, in New Jersey," and "those who practice occasionally in New Jersey as part of a large practice based in another state." *Id.* at 1109. Tolchin does not challenge these findings in his petition.

It is undisputed, therefore, that a large percentage of the persons who wish to practice law in New Jersey without a bona fide office dedicate only a small fraction of their respective law practices to New Jersey matters. It

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[6] Notably, the *Freidman* majority did not dismiss Virginia's argument that a mandatory office requirement would help ensure that those who practiced in Virginia's state courts kept "abreast of legal developments. . . . " *Friedman*, 487 U.S. at 69. Instead, the majority simply noted that there were less-restrictive means of achieving the same result, such as mandatory attendance at periodic continuing legal education courses. *Friedman*, 487 U.S. at 69.

is reasonable to assume that most of these attorneys, therefore, do not keep themselves regularly apprised of recent developments in New Jersey law. It is also reasonable to assume that those attorneys who maintain a bona fide office in New Jersey are more inclined to keep abreast of the latest changes in New Jersey's procedural and substantive law. One can also reasonably assume that those attorneys who stay current on the most recent developments are in a better position to serve the courts and their clients than those who do not. Accordingly, the bona fide office requirement bears a rational relationship to New Jersey's legitimate interest in ensuring the competency of those that practice law in New Jersey.[7]

The Third Circuit also should have concluded that the Rule is rationally related to New Jersey's legitimate interest in ensuring the accountability of New Jersey lawyers. The Third Circuit dismissed this argument solely on the grounds that "all non-resident attorneys designate the Clerk of the New Jersey Supreme Court as agent for receipt of service of process." *Id.* Therefore, the Third Circuit reasoned that "[t]he New Jersey Supreme Court can . . . discipline all members of the New Jersey bar, regardless of residency," and held that the Appellees had made "no compelling argument as to how the bona fide office requirement was rationally related to attorney accountability." *Id.* (citing N.J. Ct. R. 1:21-1(a) (1996)).

Accountability of attorneys is not limited, however, solely to judicial discipline. Clients can, and often do,

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[7] The skills and methods requirement does not cover the same ground. The skills and methods requirement deals with basic skills rather than recent developments in practice areas.

pursue legal malpractice claims against their attorneys. The following example demonstrates how the bona fide office requirement advances and, therefore, is rationally related to New Jersey's legitimate interest in ensuring that New Jersey lawyers are accountable to their clients.

An Albany, New York attorney accepts the representation of a New Jersey client in a New Jersey state court matter. The attorney commits malpractice by, among other things, failing to appear at the trial call and causing his client's complaint to be dismissed. The attorney contends that he or she never received notice of the trial date.

The client files a legal malpractice claim against the attorney in the New Jersey state courts. During discovery, the client wishes to depose the attorney's secretary. Because the secretary resides near the attorney's office in Albany, a significant burden is placed on the client. First, she must file a motion for a commission to take an out-of-state deposition under N.J. Ct. R. 4:12-2. Assuming that motion is granted, she must then pay for her and her attorney to travel to, and possibly stay overnight, in Albany where the deposition must be conducted under N.J. Ct. R. 4:14-2(a). If the deposition of the secretary reveals that other members of the attorney's office staff may have had responsibility for keeping track of trial call notices, the process has to start all over again. The defendant lawyer could also insist that all inspections of his documents be conducted at his Albany office under N.J. Ct. R. 4:18-1. Thus, an additional trip to Albany would be required. In many cases, these added costs would make discovery too costly for clients.

Trial of such a case would also be more difficult. The client could not compel anyone other than the defendant to appear at trial and, therefore, the client would be forced to read into the record the deposition transcripts of the witnesses that live outside the court's subpoena power (assuming the client could afford to take the depositions in the first place). This would diminish the trier of fact's opportunity to examine the demeanor and credibility of the witnesses. These added costs and difficulties would have the reciprocal effect of making attorneys less accountable for their malpractice.

The bona fide office requirement, however, eliminates these problems. The attorney and the attorney's staff could be served with subpoenas and deposed in New Jersey. The document inspections would take place in New Jersey. The witnesses could be subpoenaed to appear at trial in New Jersey. Accordingly, the attorney is more likely to be held accountable for his or her malpractice. Under this example, it is easy to see how the bona fide office requirement is rationally related to the state's legitimate interest in assuring attorney accountability.

In addition to the three legitimate interests advanced below by the New Jersey Supreme Court, the bona fide office requirement also advances the state's legitimate interest in encouraging New Jersey attorneys to become involved in community activities and to voluntarily provide pro bono services to the New Jersey communities where their offices are located.

New Jersey is the only state in the nation to compel mandatory pro bono representation by the members of its bar. Melissa Tennen, *Municipal Pro Bono: Going, Going . . . ,*

N.J. LAWYER, Sept. 22, 1997, at 1, 19. In *Madden v. Delran Township*, 126 N.J. 591 (1992), the New Jersey Supreme Court ruled, contrary to decisions in many other states, that the state could constitutionally compel attorneys admitted to the New Jersey bar to represent indigent defendants in the municipal courts without compensation. *Madden*, 126 N.J. at 600-11. Notably, the procedure set forth by the New Jersey Supreme Court in *Madden* provided that these mandatory pro bono assignments be parceled out by the assignment judge in each county to those lawyers who maintained their law offices in that county. This process ensured that lawyers in one part of the state would not be requested to handle pro bono cases at the opposite end of the state. *Id.* at 606-07.

Since 1993, the NJSBA's Special Committee on Pro Bono Services (the "Special Committee") has reviewed the mandatory pro bono system in New Jersey. Among its many tasks, the Special Committee surveyed the state's county bar associations and found that the mandatory pro bono assignments authorized in *Madden* had "expanded far beyond municipal court assignments to superior court assignments in civil cases involving termination of parental rights, domestic violence contempt, juveniles and other family court matters, and municipal court appeals." Mary Coogan, *The 1995 Report of the NJSBA Special Committee on Pro Bono Services*, N.J. LAWYER – THE MAGAZINE, July/Aug. 1997, at 12.

The Special Committee found that "these mandatory *pro bono* assignments have resulted in a heavy and disparate burden on the private bar, leading to the committee's objection to the arbitrary expansion of *Madden* and the

recommendation of a statewide uniform policy identifying case-types that may be assigned *pro bono*." *Id.* at 12. Moreover, the Special Committee found that "the expansion of mandatory *pro bono* assignments dilutes the availability of private attorneys to provide true, voluntary *pro bono* service for civil matters." *Id.*[8]

According to a recent survey, approximately 3000 mandatory pro bono cases are assigned annually to members of the New Jersey bar in addition to the mandatory pro bono municipal court assignments ordered in *Madden*. Tennen, *Municipal Pro Bono* at 1.

The New Jersey Law Journal annually surveys large New Jersey law firms to gauge the number of *pro bono* hours logged by attorneys at the firm. The 1997 survey noted that the state's 20 largest law firms contributed approximately 50,000 hours of pro bono services in 1996. Matt Ackerman, Erin McIntyre, & Neal Winters, *Pro Bono Efforts Ebbing Statewide*, N.J. LAW JOURNAL, June 30, 1997, at 148. When added to the efforts of New Jersey's many solo practitioners and smaller law firms, along with the many bar association programs that coordinate the pro bono efforts of New Jersey lawyers, the number of volunteer hours provided by the New Jersey bar is staggering.

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[8] On September 24, 1997, New Jersey Governor Christine Todd Whitman signed into law bill S-1886, which mandates that every municipality in the state have a public defender within six months. This new law will eliminate mandatory municipal court pro bono representation by members of the New Jersey bar, but not the expanded mandatory pro bono assignments annually distributed to members of the New Jersey bar in the state's Superior Court. Tennen, *Municipal Pro Bono* at 1.

See, e.g., Mary Coogan, *Pro Bono Attorneys: A Sampler*, N.J. LAWYER – THE MAGAZINE, July/Aug. 1997, at 22-27.

Despite the extraordinary volunteer efforts of the members of the New Jersey bar, the Special Committee's 1995 report acknowledged that there was still a greater need for voluntary pro bono services in New Jersey. Coogan, *Pro Bono Attorneys: A Sampler* at 22. Clearly, under these circumstances, the State of New Jersey has a legitimate interest in encouraging New Jersey attorneys to volunteer for pro bono and other worthy community causes.

It is reasonable to assume that attorneys that maintain a bona fide office in New Jersey are more likely than those who do not to perform voluntary pro bono and to provide other needed services to the communities where their offices are located. For example, an attorney who maintains his or her only office in Albany, New York, and who only practices sporadically in New Jersey, will rarely, if ever, take on a pro bono assignment in New Jersey. On the other hand, a lawyer that maintains a bona fide office in New Jersey will be more inclined to join the local bar association, become involved in pro bono and charitable organizations, and otherwise volunteer his or her services to those in the community where the lawyer's office is located.[9] Therefore, the bona fide office requirement is

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[9] Moreover, if the bona fide office requirement is struck down as unconstitutional, the New Jersey Supreme Court will be forced to restructure its mandatory pro bono distribution system. Assignment judges will no longer be able to assign matters just to those lawyers who maintain an office within their county. Members of the New Jersey bar might then be required

rationally related to the state's legitimate interest in encouraging voluntary pro bono participation by New Jersey attorneys.[10]

3. The Skills And Methods Course Requirement Is Also Rationally Related to a Legitimate State Interest

Petitioner Tolchin argues that the skills and methods course requirement imposes an unconstitutional burden upon non-resident New Jersey lawyers. Specifically, he contends that there is no reason why he and other non-residents should be forced to attend the skills and methods class at one of the four locations in New Jersey where the course is offered. *Petition* at 13.

It is undisputed that New Jersey has a legitimate interest in ensuring the competency of those who practice

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to take on pro bono assignments in counties where they otherwise would not ordinarily practice and which may impose a more significant burden than pro bono representation would otherwise.

[10] The NJSBA recognizes that a majority of this Court rejected a somewhat similar argument in both *Piper* and *Friedman*. In each of those cases, however, the legitimate interest in encouraging pro bono service was judged against the heightened scrutiny standard of the Privileges and Immunities Clause and, accordingly, the majority in both cases found that the residency requirements at issue were not the least-restrictive means of meeting the states' interest. Here, as explained above, the Court need not consider whether there exists a less-restrictive means of achieving the desired result under the *Pike/Brown* balancing test. Instead, the bona fide office requirement must only be rationally related to the state's legitimate interest in encouraging voluntary pro bono service.

law in New Jersey[11] and that the skills and methods requirement applies to all newly-admitted attorneys regardless of where they are domiciled. It is also undisputed that the skills and methods course is designed to teach basic skills usually not taught in law school that new lawyers must have to effectively practice law in New Jersey. On three previous occasions, this Court has extolled the virtues of mandatory continuing legal education requirements. *See Piper*, 470 U.S. at 285 n.19; *Friedman*, 487 U.S. at 69; *Frazier*, 482 U.S. at 648.

Tolchin's sole objection to the skills and methods course requirement is that he must attend the courses at one of the four course sites located in New Jersey. Of course, he concedes that Newark, New Jersey, one of the four location sites, is readily accessible to him. *Petition* at 6. In fact, the only example he can offer of any impact that the skills and methods requirement may have on interstate commerce is his proposed hypothetical situation in which a newly-graduated lawyer accepts a judicial clerkship in Louisiana and wants to return to New Jersey to practice law after the clerkship ends. Tolchin argues that the skills and methods requirement would bar that person from the practice of law. *Petition* at 13-14. In that very rare instance, however, can there be any serious question that the attorney would be allowed to begin the skills and methods course upon his or her return to the

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[11] Notably, the New York state courts, Tolchin's home state, have just announced a requirement that all newly-admitted attorneys must complete 32 hours of approved CLE courses over two years.

area? The mere statement of this question rebuts the unreasonableness of such an interpretation.

As the Third Circuit rightfully noted, the burden of traveling to the course location applies to all attorneys, regardless of where they reside. As the Third Circuit further explained, the burden in many cases is greater on New Jersey residents than upon non-residents, such as Tolchin, who can easily commute to the course location. Accordingly, there is no unconstitutional burden on non-residents to attend the skills and methods classes offered in New Jersey as a condition of their eligibility to practice law in New Jersey.

CONCLUSION

For the foregoing reasons, *amicus curiae*, the New Jersey State Bar Association, respectfully requests that the Court deny the petition for a writ of certiorari.

Respectfully submitted,

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